International Woodworkers of America, Local 3-433, AFL–CIO *and* Kimtruss Corporation. Case 32–CB–3470

August 12, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 1, 1991, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Charging Party Employer filed exceptions and a supporting brief and Respondent International Woodworkers of America, Local 3-433, AFL–CIO filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to approve the settlement.

ORDER

It is ordered that the settlement is approved.

[1] We note that at par. 16 of the judge's decision, the first sentence should refer to ''the Employer'' not ''the Union.''

DECISION OF ADMINISTRATIVE LAW JUDGE APPROVING SETTLEMENT, SEVERING CASE, AND SETTING BRIEFING SCHEDULE ON REMAINING CASES

MICHAEL D. STEVENSON, Administrative Law Judge. On November 28, 1990,[1] the instant case was heard before me in Fresno, California. At the close of the case, I ordered briefs to be filed on or before January 3, 1991. On December 14, the General Counsel and Respondent Union (Union) reached agreement in Case 32–CB–3470, and on December 17, the General Counsel filed a motion to the administrative law judge to approve supplemental partial settlement agreement (settlement agreement). The settlement agreement is characterized as ''supplemental'' because during the hearing, I approved certain all-party partial settlements of issues involving both Respondent Union and Respondent Employer. The settlement agreement is characterized as ''partial,'' because if approved, there would remain for decision only those allegations pending against Respondent Employer (the Employer) Cases (32–CA–11176, 32–CA–11363).[2]

On December 20, I issued a Rule to Show Cause why the settlement agreement should not be approved. On January 10, 1991, the Employer filed its ''Opposition to Motion to Approve Supplemental Partial Settlement Agreement.'' Thereafter, both the General Counsel and Union have filed their responses to the Employer's opposition. I turn to decide the issue.

Once the hearing has opened and, even after it has closed, as in this case, the administrative law judge to whom the case is assigned, has discretion to approve or disapprove the settlement agreement. If the administrative law judge believes the settlement agreement does not effectuate the policies of the Act, the administrative law judge may refuse the General Counsel's motions to approve the settlement agreement and to dismiss the complaint. The administrative law judge retains discretion to approve the settlement agreement even though it may be opposed by the General Counsel or as here, by the Charging Party. *Oshkosh Truck Corp. v. NLRB*, 530 F.2d 744 (7th Cir. 1976); *Electrical Workers IUE Local 201 (General Electric Co.)*, 188 NLRB 855 (1971).

There being no apparent disagreement among the parties with the foregoing, I turn next to recite some brief background surrounding the proposed settlement agreement.

Case 32–CB–3470 alleges that the Union violated the Act by failing to bargain in good faith by first promising the Employer that it would recommend to the membership that the tentative agreement be approved, but then acting contrary to the promise. At page 2, paragraph 4 of motion to approve the settlement agreement, the General Counsel represents

> Pursuant to the supplemental partial settlement, on December 9, 1990, Counsel for the General Counsel was informed that Respondent Union met with its members, recommended the contract, and the contract was ratified. This action by Respondent, coupled with the posting of the appropriate Notice would fully remedy the unfair labor practices alleged in the Complaint in Case 32–CB–3470. In any event, any issues relating to the contract ratification vote would appropriately be a compliance matter.

The Employer asserts that for three reasons the settlement agreement should be disapproved:[3]

> (1) Dismissal of the complaint against the Union is improper because the Judge must consider those charges in order to determine whether the strike was an economic one or an unfair labor practice strike.

Of the three reasons presented, this one is so lacking in merit that little discussion is required to dispose of it. The Employer argues that by approving the settlement agreement, I will be precluded from determining whether the Union's conduct caused or contributed to the strike, thereby constituting a defense to the charges against the Employer. The Employer is charged with violating the Act by announcing a bonus for those employees who did not participate in the strike and by causing an unfair labor practice strike.

I find that approval of the settlement agreement will not affect disposition of the charges against the Employer. Thus, if I determine that the Employer caused an unfair labor practice strike, the Board would not recognize the ''unclean hands'' defense that the Union may have also acted improperly. *Roofers Local 81 (Beck Roofing Co.)*, 294 NLRB 285 (1989), enfd. 915 F.2d 508 (9th Cir. 1990). I agree completely with the Union, brief at 4–5, that the Board does not

[1] All dates refer to 1990 unless otherwise indicated.

[2] The settlement agreement was originally approved on January 14, 1990, when due to administrative error, the objections of the Employer were not timely transmitted to me.

[3] I have taken the liberty of changing the Employer's sequence of the three reasons to one that seems more convenient for my discussion.

recognize a union's unfair labor practice strike which the Employer appears to be suggesting.

Finally, to the extent that the Union's conduct plays a role in the case remaining after the settlement agreement is approved, the Union continues as a party by virtue of its charging party status, and the Employer will be free to renew its arguments which I here dismiss. In deciding the charges against the Employer, I reserve every right to make findings with respect to the Union's conduct, if appropriate, both in terms of general background,[4] and in terms of the legal issues presented.

(2) The settlement does not meet the Board's standards for approval of settlements

In *National Telephone Services*, 301 NLRB 1 (1991), the Board adopted the judge's recommendation to accept the settlement agreement presented unilaterally by the respondent. The objection of the charging party was found to be without merit. At footnote 1 of its decision, the Board noted the General Counsel's lack of objection to the settlement, a position taken apparently after the case reached the Board. At page 4, the judge noted the case of *Independent Stave Co*., 287 NLRB 740 (1987), a case relied on by the Employer here, and stated, ''Although purporting to deal with private, non-Board settlements, the case set forth some principles which are applicable here. It said that before approving a purported settlement, it would examine four factors: (1) whether the parties have agreed to be bound and what position the General Counsel has taken in regard to the settlement; (2) whether the settlement is reasonable in light of the allegations of the complaint against the risks inherent in litigation; (3) whether there has been any fraud, coercion or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violations or has breached past settlement agreements.''

In measuring the facts and circumstances of the present case against the four factors listed above, I note as the Board did in *National Telephone Services*, supra at footnote 2, that the settlement agreement settles all the allegations of the complaint by providing for the appropriate remedies, including notice posting, and that Respondent has not been shown to be a recidivist violator of the Act. Moreover, in this case, the General Counsel is a party to the settlement agreement, which makes for an even stronger case for approval than the *National Telephone Services*, case where the General Counsel merely indicated a lack of objection. Compare *Copper State Rubber*, supra, 301 NLRB 138 at 139. No claim is made by any party in the present case of fraud, coercion, or duress in reaching settlement and I find that the settlement is reasonable in light of the allegations of the complaint against the risks inherent in litigation. See *Farmers Cooperative Gin Assn*., 168 NLRB 367 (1967).

With respect to specific contentions of the Employer (Br. at 8), it claims that the settlement agreement is not reasonable on its face because it fails to make the parties whole for the Union's unfair labor practice. I will dispose of this argument below. At page 9, the Employer merely renews its argument already covered in the first section of this decision, that the strike allegedly resulted from the Union's conduct, not the Employer's.

The Employer also argues that since the case has already been tried, the element of judicial economy is absent and thus the settlement agreement should be disapproved. Putting aside the fact that the Board did not list in *Independent Stave Co*., supra, a reason to reject settlement agreements if settlement is reached after trial, I note that under the Employer's contention, no posthearing settlement agreements could ever be approved, an absurd result. Moreover, the Employer ignores in its interpretation of ''judicial economy,'' the Board's time and that of a reviewing court.

Finally, the Employer cites the cases of *Teamsters Local 115 (Gross Metal Products)*, 275 NLRB 1547 (1985), a case which I find may be distinguished on its facts. In that case, the Board upheld the judge's refusal to accept a settlement agreement containing a nonadmission clause. That case involved long-term violations of the Act and serious acts of violence. In other contexts, the Board has approved the inclusion of nonadmission language. *Mine Workers (Decker Coal)*, 294 NLRB 162 (1989); *Concrete Materials of Georgia v. NLRB*, 440 F.2d 61 (5th Cir. 1971).

(3) The proposed remedy would not make the Employer or the employees whole for the Union's unfair labor practice

Here the Employer, assuming that the Union was responsible for the strike, argues that the Employer should be entitled to compensatory damages which the settlement agreement does not provide. I find that the Employer has received all that it is entitled to at this stage of the proceeding. Thus the Union has held a second ratification vote in which it recommended ratification. As the Employer concedes with Exhibit A to its brief, the membership then voted to ratify ''the last contract proposal and unconditionally offered to return to work.''

In a sense, by receiving an affirmative ratification vote the Union received more than it was entitled to. However, to the extent it is entitled to even more, as the General Counsel has stated in its motion to approve the settlement agreement, ''any issues relating to the contract ratification vote would appropriately be a compliance matter.'' The Employer has failed to show how it would be prejudiced by presenting its claims during a compliance proceeding rather than insisting that the entire settlement agreement be rejected. Nor has it shown how the Employer could expect more from me if, after adjudication, I found that the Union had committed the unfair labor practice alleged.

Finally, if the Employer is entitled to further remedy and assuming it is dissatisfied with the results of compliance, it may be entitled to present its claims in a different forum, an issue about which I make no finding.[5]

Rather, I find that the Employer has failed to persuade me that the settlement agreement should not be approved. Accordingly, I approve it, I sever this case from the remaining cases and set the date for briefs in this case on the remaining issues in this case to be received in this office not later than February 15, 1991. In conclusion, under separate cover, I will transmit the approved settlement agreement to the Re-

[4] *Copper State Rubber*, 301 NLRB 138 (1991).

[5] I can assume without finding that if the Employer finds an appropriate forum, it would need to establish that, but for the recommendation of the union business agent, the contract would have been approved. No such showing has been made in the instant case.

gional Director for Region 32 for distribution to the parties in the normal course and for supervision of compliance.[6]

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.